Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

Dr. Richard A. Scarnati, Petitioner,

v.

Ohio Department of Mental Health,
Respondents.

On Petition for a Writ of Certiorari to the
COURT OF APPEALS
TENTH APPELLATE DISTRICT,
FRANKLIN COUNTY, OHIO

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, PRO SE

QUESTION PRESENTED

"Whether A State May Condition Public Employment On A Physician's engaging in unethical conduct in violation of the constitutional rights of his inmate patients, and of his own constitutional rights.

LIST OF PARTIES

The parties to the proceedings and in this Court are Petitioner Dr. Richard A. Scarnati, past prison psychiatrist employee, the plaintiff-appellant below, and Respondents Ohio Department of Mental Health, the defendants-appellees below, petitioner's past employer.

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IN THE
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October Term, 1994

Dr. Richard A. Scarnati,
Petitioner,
v.
Ohio Department of Mental Health,
Respondents.

Petition For A Writ Of Certiorari to the
Court Of Appeals
Tenth Appellate District,
Franklin County, Ohio

Petitioner Dr. Richard A. Scarnati respectfully petitions for a writ of certiorari to review the Judgment of the Court of Appeals, Tenth Appellate District, Franklin County, Ohio in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, 8-11-94 (App., infra, A1-A19) is unreported. The Judgment of the Court of Appeals, 8-11-94 (App., infra, A20) is unreported. The Supreme Court of Ohio, 12-7-94, Entry, declining to hear the case (App., infra, B1) is unreported. The Supreme Court of Ohio, 12-29-94, Reconsideration Entry, denying the motion for reconsideration (App., infra, B2) is unreported. The Court of Claims of Ohio, 1-3-94, Entry Granting Defendant's Motion For Summary Judgment (App., infra, C1-C3) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 11, 1994 (App., infra, A20). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

STATUTORY PROVISION INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV (1868), Section 1. United States Constitution.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Amendment I (1791) United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VIII (1791) United States Constitution

...nor cruel and unusual punishments inflicted.

Amendment XIV (1868), Section 1.
United States Constitution

...No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. Section 1983

Section 1983 of the Civil Rights Act provides in part that every person who, under color of any statute, ordinance,

regulation, custom or usage, of any state or territory, subjects any person in the United States to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the injured party.

Title 42 U.S.C. Section 1997

Subchapter 1-A-Institutionalized Persons. Section 1997. Definitions: As used in the subchapter - (1) The term "institution" means any facility or institution - (A) which is owned, operated, or managed by, or provides services on behalf of any state...and (B) which is - (i) for persons who are mentally ill...; (ii) a jail, prison, or other correctional facility...this Act may be cited as the, 'Civil Rights of Institutionalized Persons Act'.

Title 42 U.S.C. Section 1997a

Section 1997a Initiation of civil actions. (a) Discretionary authority of Attorney General: preconditions: Whenever the Attorney General has reasonable cause to believe that any State...official, employee, or agent thereof...is subjecting persons residing in or confined to an institution, as defined in section 1997 of this title, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate...

STATEMENT

Dr. Richard A. Scarnati, petitioner herein, a Board Certified Psychiatrist is employed full-time at North Central Mental Health Services, 1301 N. High Street, Columbus, Ohio 43201.

Petitioner is a Clinical Assistant Professor of Psychiatry: Department of Psychiatry, College of Medicine, Ohio State

University; and Ohio University, College of Osteopathic Medicine.

Petitioner is a member of: (1) The Psychiatric Society of Central Ohio, (2) Ohio Psychiatric Association, (3) American Psychiatric Association, (4) World Psychiatric Association, (5) American Academy of Psychiatry and the Law, (6) Christian Medical Dental Society, (7) American Osteopathic Association, (8) Physicians for Social Responsibility, (9) Physicians For Human Rights, and (10) American College of Neuropsychiatrists (Associate Member).

As a member of the American Osteopathic Association, petitioner is bound by the Osteopathic Oath in which he is to preserve the health and life of his patients, perform faithfully his professional duties, employ recognized methods of treatment, aid the general welfare of the community, sustaining its laws, and will not engage in any practices which will shame or discredit appellant or his profession.

As a member of the Christian Medical-Dental Society, petitioner is bound by the Christian Hippocratic Oath and is to bring no stain upon the learning of the medical art, will use treatment to help the sick according to his ability and judgment, in purity and in holiness he will guard his art.

As a member of the American Psychiatric Association, petitioner is bound by the principles of Medical Ethics of the American Medical Association with annotations especially applicable to Psychiatry, and petitioner by this code must recognize responsibility not only to his patients but to society, be dedicated to providing competent medical service with compassion and respect for human dignity, and will not be a party to any type of policy that excludes, segregates or demeans the dignity of any patient.

As a member of the World Psychiatric Association, petitioner is bound by the Declaration of Hawaii II ethical values: The aim of psychiatry is to treat mental illness and to promote mental health. To the best of his or her ability, consistent with accepted scientific knowledge and ethical principles, the psychiatrist shall serve the best interests of the patient, and be concerned for the common good. Every Psy-

chiatrist should offer the patient the best available therapy to his knowledge and treat the patient with dignity. If a third party demands actions contrary to scientific knowledge or ethical principles the psychiatrist must refuse to cooperate. The Psychiatrist should stop all therapeutic programs that may evolve contrary to the principles of this Declaration. (Petitioner did, he went on strike!)

Petitioner had been a full-time prison psychiatrist for the Ohio Department of Mental Health for over 7-1/2 years, working at the Ohio Pen in Columbus, Ohio from November 1979 to April 1981, and Lebanon and Warren Correctional Institutions near Cincinnati, Ohio from February 1985 to July 1991.

Petitioner had been a member of a union during part of his total employment under respondents. He had filed a grievance on May 28, 1991 regarding the fact that he had not been able to give constitutionally mandated treatment, and that the inmates were suffering from lack of care. Petitioner's grievance was denied because respondents felt it was their right to address staffing, and they did not feel there was a staffing problem.

Petitioner had gone on strike against the Ohio Department of Mental Health in June and July 1991 when he discovered his patients were not receiving constitutionally mandated treatment, and he was not willing to violate his medical codes of ethics. He was forced to resign in July 1991 when respondents had not responded to his plea for more help.

Petitioner was unemployed for 7-1/2 months and had applied for Unemployment Compensation. Although he was denied such initially, after appeals through the Courts he was awarded such benefit when the Ohio Court of Appeals found that he had every right ("just cause") to refuse to continue working under the conditions reflected in the record.

This case arose from the attempt of petitioner Dr. Richard A. Scarnati to obtain justice by way of tort (Cause of Action) for Wrongful Discharge (Constructive Discharge, Abusive Discharge) against The State of Ohio, Ohio Department of Mental Health, respondents Office of Psychiatric Services to Corrections, when petitioner's discharge is contrary to a

clear mandate of Public Policy, as expressed in State of Ohio Standards, Codes of Medical Ethics, State and Federal Statutes, Constitutional Mandates, and Case Law.

Petitioner had entered the Court of Claims in hopes of obtaining total justice for his claims.

On January 3, 1994 Judge Russell Leach granted respondent's Motion For Summary Judgment, because he felt petitioner's Complaint was not properly before the Court, and petitioner was attempting to relitigate issues that had already been determined pursuant to the grievance procedure in petitioner's collective bargaining agreement.

Petitioner appealed the judgment of the Ohio Court of Claims on January 24, 1994.

The Ohio Court of Appeals, Tenth Appellate District affirmed the judgment of the Court of Claims overruling petitioner's assignments of error on August 11, 1994. Among other things, they felt that petitioner did not present a claim for relief for constructive discharge; that petitioner and respondent's perceptions of the necessary psychiatric coverage clearly differed; that in their opinion petitioner had not provided evidence that respondent's position is unreasonable in relationship to patient care; that in their opinion that there is no evidence of specific objective, and recognized ethical standards that the respondent's position violates and that in their opinion that there is no evidence of wrongful conduct by the respondents.

Petitioner appealed the judgment of the Ohio Court of Appeals on August 29, 1994 to the Supreme Court of Ohio.

On December 7, 1994 the Supreme Court of Ohio declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question. On December 16, 1994, petitioner filed a Motion For Reconsideration In Support of Jurisdiction in the Supreme Court of Ohio; such court denied Reconsideration on December 29, 1994.

All of the courts rejected petitioner's constitutional arguments regarding the imposition of unconstitutional conditions on public employment.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for two reasons:

I. A State Must Not be Permitted to Condition Public Employment On A Physician's engaging in unethical conduct in violation of the constitutional rights of his inmate patients, and of his own constitutional rights

II. The Decision of the Court of Appeals Is Erroneous

(A) Conflicts

(a) Litigation Issues

Under the Employee-Union Contract. Staffing could only be addressed by the employer. Therefore petitioner's grievance was nothing more than a ghost rider following a perfunctory paper trail because respondent denied petitioner's grievance.

Respondents have maintained that petitioner's case is a Breach of The Collective Bargaining type of suit. It is not. It is a tort case.

A Union-Employer Contract is not a competent standard to address physician's ethical practice of medicine.

This Court's holding in the following three cases should help to clear up respondent's confusion and previous court's errors regarding this matter:

(1) Atchison, T. & S.F.R. Co. v. Buell, 40 US 557, at 565:

> Notwithstanding the strong policies encouraging the arbitration of labor disputes, different considerations apply where an employee's claim against an employer is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

(2) Barrentine v. Arkansas - Best Freight System, 450 U.S. 728, 745-746. As we stated in Gardner-Denver:

"In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit...an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums."

and at 737:

"Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining."

and at 729:

"...even when the Union has fairly and fully presented the employee's...claim, the employee's statutory rights might still not be adequately protected. Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies...thus depriving an employee of protected statutory rights. Furthermore, not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, but also arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief."

(3) Lingle v. Norge Division, Magic Chef, 486 U.S. 399 at 411:

"...there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective bargaining agreements." "This court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims..."

Petitioner does have a right to petition the Government for a redress of grievances according to Amendment I (1791) United States Constitution, and through the incorporation of such Amendment in the 14th Amendment.

The Courts below have abridged petitioner's privileges and immunities in violation of his due process rights under the 14th Amendment (1868), Section 1. United States Constitution.

"Due process is flexible and calls for such procedural protections as the particular situation demands, "Morrissey v. Brewer, 408 U.S. 471, 481. (Cite by Mathews v. Eldridge, 424 U.S. 319 (1976) 95).

(b) Ethical Medical Practice Issues

"Public has right to rely on promulgated code of ethics adopted by medical profession." Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793.

The office of Psychiatric Services to Corrections, Ohio Department of Mental Health (respondents) committed a tort of "abusive discharge" (Wrongful Discharge, Constructive Discharge) against petitioner because respondents ordered petitioner to take certain treatment steps which were unethical and in violation of medical codes of ethics. Petitioner had an ethical duty to resist such orders because such practice threatened the patient's health, welfare and safety. Petitioner was "forced" to go on strike and later resign because he would not violate his medical codes of ethics.

Vanderbilt Law Review 28 Vand. L. Rev. 806 (1975) on page 806: stated that an "abusive discharge" could arise more frequently in the medical context in which a doctor could be ordered to take certain steps that they believe are unethical. Recent cases have held that the (professional) is under a duty to resist such an order, and that whenever a practice threatens the patient's health, welfare, or safety the (professional) has no choice but to take appropriate action on his behalf (petitioner filed a grievance, and later striked). And further on

page 833, letters of protest, witnesses to discussions, minutes of meetings and grievance petitions all document the professional's resistance to unethical activity (petitioner's Briefs are filled with such examples).

Exhibit 43[1]: is petitioner's initial employment contract dated 2-4-85 which states that petitioner will see approximately 60 patients on a continuing basis. Exhibit 41: is petitioner's performance review signed by local administrator Mark Madry on 5-15-91, regional administrator William Hicks on 6-18-91, and Ohio Department of Mental Health Director Dr. Michael Hogan (respondents) on 7-17-91, after the evaluation deadline on 4-3-91. This is an extremely important key document! The rating period is from 3-4-90 to 3-3-91, a whole year, and quantity of work was rated above expectation ratings, and yet one notes in the form that another 132 patients are to be transferred to petitioner. In comparing this to initial contract of seeing 60 patients one notes a factual indication of an excessive caseload, and this is evidence that respondent's position is unreasonable in relation to patient care showing that the Ohio Court of Appeals is in error.

On the July 1, 1991 Temporary Suspension of Duties (Exhibit 18) respondents had limited petitioner's duties for an indefinite period for only:

1. Medication services
2. Probate court evaluations
3. Psychiatric assessments and consults
4. D-3 evaluations (for the Parole Board)

This counters petitioner's Ohio Classification Specification Class Title Psychiatrist, Code 65371, and OPSC's (respondents) Position Description of petitioner initialed by local administrator Mark Madry (respondent) on 5-3-91 (Exhibit 20). As a further violation by respondents we note that in the OPSC "position description" (Exhibit 20) that petitioner "Serves as a member of a multidisciplinary treatment team

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[1] Petitioner has not deleted references to exhibits even though they are not a part of this Petition. He wanted the Court to be aware that they exist in the record.

and in matters where medical issues take precedence over clinical decisions will have veto authority over treatment team"; and yet, we note above that in petitioner's duties for an indefinite period" as per local administrator (respondent) (Exhibit 18) that petitioner is no longer even a part of a multidisciplinary treatment team, violating the Davis v. Watkins 384 F. Supp. 1196, 1203 (1974) mandate of Individual Treatment plans for each patient because of petitioner's lack of input to such plan secondary to his removal from the treatment team by respondents. This is an abridgement of privileges of petitioner's 14th Amendment rights; and also his liberty rights under such Amendment.

Petitioner noted on June 27, 1991 that he had not seen 37 Residential Treatment Unit patients for one month, 14 of which for two months. He now had 104 patients, including the patients in the Residential Treatment Unit, and was expected by (respondent) OPSC to take another 80 to 100 patients.

OPSC (respondent) had petitioner now doing mostly new evaluations of patients. His regular patients were decompensating. He could not tolerate this.

Petitioner went on strike (Exhibit 29) in hopes to raise public awareness for the plight of his patients. After 3 days of strike, no response was forthcoming. No one cared. Because petitioner could not meet the moral, ethical, clinical, and legal demands placed upon him, he resigned. (Exhibit 30)

Many other professionals recognized the impossibility of petitioner's position:

June 6, 1991 letter (Exhibit 25) from Tom Woodruff, President, District 1199 SEIU, AFL-CIO to (respondent) Dr. Michael Hogan, Director, Department of Mental Health, among other things, Tom stated, "Dr. Scarnati's (petitioner's) caseload is way above the norm, and impossible to handle professionally and ethically". He felt this was a "crisis situation", and that, "The grievance process is too slow to prevent harm coming to many clients".

A letter (Exhibit 31) to petitioner dated 7-3-91 by David Helm M.D., Dr. Helm was petitioner's colleague. He had been a prison psychiatrist with respondent for 15 years. His contract was not renewed after June 1991. (A wrongful decrease of psychiatric services by respondent.) In his letter, Dr. Helm stated that it saddened him that administrators (respondent) cut services and he admired petitioner's stand (strike) in pointing out the need for better services.

A letter dated 7-5-91 (Exhibit 32) to petitioner from Dr. Larry Mendel, Medical Director, Ohio Department of Rehabilitation and Corrections (DRC). This is an extremely important key document for petitioner's case. As the top State of Ohio Prison Doctor, Dr. Larry Mendel does represent management, and showing the great error of the Court of Appeals, he does agree with petitioner regarding respondent's inadequate psychiatric care. He felt that respondent made an inappropriate decision to terminate Dr. Helm's contract, and that only 7% of the respondent's budget went for psychiatrists which is supposed to be the purpose of their (respondent) organization (Office of Psychiatric Services to Corrections).

Mrs. Yolanda Jones, R.N., B.S.N., prison nurse, had given petitioner a copy of her resignation as Psychiatric Nurse II letter dated 7-11-91 (Exhibit 33). In her letter she stated, "I regret the department's inability to provide adequate, safe staffing levels for our clients".

1199 SEIU Solidarity, Union's Newsletter August 1991, Vol 2., No. 4., page 4 (Exhibit 34) mentions that Psychiatrist (petitioner) stands up for ethics:

It is the position of the Union that no worker should be forced to work in an unsafe, unprofessional, or unethical environment.

The attorney representing the Ohio Department of Mental Health (respondent), Mr. Baumgarten in the transcript of testimony of the Unemployment Compensation hearing date 11-20-91, appeals docket No. R91-11726, p. 40 (Exhibit 36) mentions "I was just saying I think (petitioner) Dr. Scarnati from my understanding, and from talking with individuals,

did some fine work for us (respondents) while working in our office of psychiatric services of correction (OPSC), and I think his concerns are genuine and I think his concerns are real". Since real means true according to the Webster Dictionary, and this attorney representing respondent and the attorney general's office, of the State of Ohio, feels petitioner's concerns are true, we again fine an error by the Court of Appeals in stating petitioner did not provide any genuine issue of fact.

On page 44 (Exhibit 37) of the transcript Mr. Baumgarten (respondent) stated, "The idea was to give good (petitioner underlined for emphasis) clinical care". Petitioner totally agrees! The attorney general's office set the standard: "good clinical care". The main problem is that petitioner was not only unable to give good clinical care he wasn't even able to give adequate care! That was why he went on strike, and later resigned.

Prison Psychologist Howard I. Kamen, Ph.D., in The Cincinnati Post, 7-8-91, article (Exhibit 39) entitled "Inhumane Treatment" agreed that providing only one psychiatrist (petitioner) at the two largest state correctional facilities constitutes inhumane treatment of the inmate populations.

Petitioner, a physician, a Board Certified Psychiatrist, a graduate of two reform schools, B.S., M.A., and D.O. Degrees, A average doctoral studies in education, two psychiatric residency training certificates, corrections academy graduate, prison psychiatry publications, numerous professional memberships, two medical school clinical faculty appointments, with 7-1/2 years of full-time prison psychiatry experience, may be considered an expert in prison psychiatry.

Petitioner is perplexed in that his professional opinion regarding the care of his patients appear to stand for naught in the Courts.

In Nelson v. Heyne, 491 F. 2d 352 (1974) the court deferred to the expert:

> "A judge lacking expertise in medicine should be cautious when considering what are "minimal medical standards" in particular situations."

(c) Unconstitutional Conditions

Looking at the principles in Sherbert v. Verner, 374 U.S. 398, the constitutional principle is this, a person cannot be made to choose between a constitutionally protected status or right and retention of a government benefit. The parallel in petitioner's case, lies in the fact that respondents exacted a price for petitioner to retain his position. The price was engaging in unprofessional, unethical conduct that deprived inmates with psychiatric disorders of their civil rights, and exposed petitioner to a civil rights damages action under Title 42 U.S.C. 1983. In Sherbert, Appellant had been expected to sacrifice her religious belief in order to quality for unemployment compensation. In like fashion respondents expected petitioner to sacrifice his professional ethics and his adherence to the Constitution in order to retain his employment, thereby violating his constitutional rights.

The court of appeals erred in its analysis of "just cause":

When the court looked at the legal construct, the term "just cause" in petitioner's unemployment case, (Scarnati v. State of Ohio Unemployment Compensation Board of Review et al., No. 92 AP-1631, (3-2-93), Journal Entry of Judgment, In The Court of Appeals of Ohio, Tenth Appellate District, unreported (Exhibit 46). (Scarnati v. Unemployment Compensation Board of Review, et al., No. 92 CVF-04-3176, (4-20-93), Decision and Entry, Court of Common Pleas of Franklin County, Ohio, unreported (Exhibit 47) where the same Court of Appeals found that petitioner had every right ("just cause") to refuse to continue working under the conditions reflected in the record, the court did not review the facts upon which the "just cause" finding was predicated.

The facts in the "just cause" decision may fall short of collaterally estopping the respondents, but they surely suffice to withstand a summary judgment motion.

Petitioner has proven that he had "just cause" for his resignation by a manifest weight of evidence that he presented to the Ohio Court of Appeals. The court found (Exhibit 45)

that petitioner had every right to refuse to continuing working under the conditions petitioner was exposed to by respondents.

Respondents had an opportunity to appeal these decisions and judgments but did not appeal, thereby conceding to the judge's fact findings:

(A) LCI (LeCI) Lebanon Correctional Institution housed a residential treatment unit which provided intensive psychiatric services to some of the most troubled of Ohio's prison inmates.

(B) Inmates in the residential treatment unit commonly suffered from a variety of mental and emotional problems.

(C) When Dr. Scarnati (petitioner) began his work for the State of Ohio, he was expected to provide care for approximately sixty inmates-patients.

(D) As time went on, the numbers (of patients) increased dramatically.

(E) By June of 1991, petitioner was serving one hundred four inmate-patients while trying to provide a variety of other services such as psychiatric evaluations prior to parole hearings.

(F) Petitioner's duties by June of 1991, included not only care for the inmates in the residential treatment unit at LCI (LeCI), but also care for inmates in the general population at LCI (LeCI) and care for inmates at nearby Warren Correctional Institution ("WCI").

(G) WCI was a maximum security institution, housing prisoners convicted of murder and other violent crimes.

(H) In June of 1991, "budget constraints" caused OPSC to terminate the contract with a second psychiatrist who was providing services at LCI (LeCI) and WCI.

(I) Petitioner was asked to take on eighty additional psychiatric patients.

(J) Petitioner already felt that his case load forced him to provide inadequate care to at least some of the patients for whom he was responsible.

(K) Petitioner had not been able to see thirty-seven of his patients for over one month. Fourteen of the thirty-seven had not been seen for over two months.

(L) Petitioner felt that he was being forced to violate the ethics of his profession by being asked to care for more patients than he could possibly assist.

(M) Petitioner attempted to call attention to his plight and the plight of his patients by declaring a one-man "strike". Petitioner's "strike" drew letters of support from other mental health professionals but no real relief in the form of additional psychiatrists to assist petitioner.

(N) Petitioner applied for unemployment compensation.

(O) Petitioner had discontinued his employment with just cause.

(P) The Court of Appeals of Ohio Tenth Appellate District found that the Court of Common Pleas, bound by R.C. 4141.28 (O) in deciding that the decision of the board was lawful, was reasonable, and was in accord with manifest weight of the evidence was in error.

(Q) The record reflects that the level of psychiatric services provided to inmates in the prisons of Ohio has steadily deteriorated over the last ten to fifteen years.

(R) As the number of inmates has increased, the number of psychiatrists available to provide them necessary psychiatric services has not kept pace.

(S) Petitioner had every right to refuse to continue working under the conditions reflected in the record.

(T) Petitioner attempted to force improvements with his "strike" but the publicity the "strike" generated did not result in a timely remedying of the situation.

(U) The fact that petitioner placed his professional reputation on the line in one last attempt to help the inmates he served is only to be commended.

(V) The prison system has suffered a substantial loss in losing a professional (petitioner) who cared enough about the inmates to attempt drastic action to force the improvement of psychiatric care.

Looking at these facts it is plainly seen that respondent does not have any basis for a Motion for Summary Judgment, but it most certainly gives support for a Motion for Summary Judgment in favor of petitioner!

Respondents inadequate mental health care of inmates is nothing new. A pattern exists that further supports petitioner's claims here.

Representative facts in a Stewart v. Rhodes November 3, 1980 Federal Hearing are similar to what they are in this case, as is seen in Ronald E. Stewart v. James A. Rhodes, (12-5-80) Civil Action No. C-2-78-220 in the U.S. District Court for The Southern District of Ohio, Eastern Division unreported (Exhibit 13). This hearing was instigated by petitioner because of inadequate care of inmates.

Memorandum In Support (pertinent particulars) are:
Staffing (pertinent particulars) are:

> Page 6: "The DFP (Department of Forensic Psychiatry) (Respondents) staffing pattern provides for 3.2 full-time equivalent psychiatrists for CCF...The remaining CCF psychiatrists have testified fully as to the effects of the staffing shortage. Neither the illness of a particular psychiatrist nor the vagaries of state employment practices should operate to deprive plaintiffs (inmates) of their right...to adequate psychiatric care. The record fully supports a find that current psychiatric staffing is inadequate and therefore a violation...We urge the court to order that staffing be returned to its previous level".

Conclusion:

Page 6: "One additional point must be mentioned. One of defendant's efforts at trial was to challenge the credibility of Dr. Scarnati. We have found that employees willing to testify about institutional deficiencies have been rare and Dr. Scarnati should be commended for his candor and dedication to meeting the needs of his patients".

Page 7: "Dr. Scarnati (petitioner) offered factual testimony...In each instance, his testimony was corroborated, and in some cases expanded upon, by the other CCF psychiatrists and/or by Department of Forensic Psychiatry (DFP) reports. Dr. Scarnati's testimony should be fully credited by this court".

"Because respondent's actions have violated inmates' Eighth Amendment right to treatment, respondent is not entitled to immunity".

Since the time petitioner's Ohio Supreme Court Memorandum was filed, petitioner had become aware of new and recent documents which show that inadequate mental health care had been present in the State of Ohio Prison system, giving full support to petitioner's allegations of inadequate psychiatric care, and providing a foundation stone for his constructive discharge allegations.

Early in 1994 petitioner became aware of Dunn v. Governor George Voinovich Case No. C1-93-0166, U.S. District Court, Southern District of Ohio Western Division. It was filed under Title 42 U.S.C Section 1983, Class Action By Inmates, alleging inadequate psychiatric care violating inmates 8th and 14th amendment rights. Petitioner too may have been sued if he would have remained in the system giving inadequate care.

To the best of petitioner's understanding, the Ohio Attorney General's Office felt that the inmates had a very good case, and to avoid a suit they wanted to work on a settlement

in which their office was to contract with an expert team who were to study the problems and make recommendations. The expert's study is a two-volume report: Mental Health Care in the Ohio Department of Rehabilitation and Correction. Volume I is 346 pages and Volume II is 216 pages.

The expert team members were: (1) Fred Cohen, esq. (2) Joel Dvoskin, Ph.D. (3) Dennis Koson, MD (4) Staff: Ms. Jody Jackson, Ms. Lori Torgerson and Ms. Beverly Perry, RN.

Rather than "overburden" the Ohio Supreme Court with a 562 page document, petitioner had included the following representative pages: Volume I pages: i, xiv, 11, 12, 59, 82, 84, 104, 105, 146; Volume II pages: 37, 91, (Ohio Supreme Court Appendix 4):

> page i: "...the Exp (Expert) T. (team) has arrived at a reasonably complete understanding of the Ohio system for providing mental health care to adults confined in its correctional facilities."
>
> "We found a dual-agency system struggling to provide mental health care and inadequate in every important respect: mental health and support staff, treatment/counseling/staff support space, and in access to mandate mental health care."
>
> "Staffing ratios for both OPSC (Office of Psychiatric Services to Corrections) and DRC (Department of Rehabilitation and Correction) reveal that neither psychiatric nor psychological staff or services kept pace with the increase in Ohio's inmate population."
>
> page xiv: "Inmates who are locked down and on mental health caseloads must be seen very regularly." (May the Court be aware that petitioner's time on the RTU (Residential Treatment Unit) was reduced from a 40 hour to 5 hours a week causing petitioner not to see 37 of his patients for one month, 14 of which

for two months because during this time respondents had petitioner seeing other patients).

page 11 and 12: "The "Pope Report"[2] finds what appears to be a shocking inadequacy in mental health staff, most dramatically illustrated by having the full-time equivalent (FTE) of only 6.6 psychiatrists for 22 major facilities with about 33,000 inmates."

"Putting aside any function except the prescribing and monitoring of medication—and this is the primary psychiatric treatment modality in the Ohio system—this is clearly an inadequate number of psychiatrists." (This gives full support for petitioner's strike, resignation (constructive discharge), and suit against respondents.)

Page 59: "Conclusion" "The Exp. T. finds fundamental flaws in the Ohio prison system on the issue of providing the seriously mentally ill even minimally adequate access to appropriate mental health care." (This statement completely supports petitioner's stand that he was unable to give adequate care).

Page 82: "...what Ohio cannot do is continue with the existing level of mental health staff...because

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[2] On June 30, 1991 the staff of the Correctional Institution Inspection Committee (CIIC) issued a "Report on Mental Health Services in Ohio Prisons." (Hereinafter "The Pope Report," as it is commonly known, after its principal author, staff member Shirley Pope.) The "Pope Report" is well documented and fairly comprehensive in its fact finding, analysis, and recommendations. (The Exp. T. on page 11 of Ohio Supreme Court Appendix 4 mentioned that their findings somewhat resemble that of the "Pope Report". May the Court note that what is so ironic here, is that this "Pope Report" which documented and supports petitioner's stand regarding inadequate staffing and inadequate mental health care was issued during the same time that petitioner was on strike against the Ohio Department of Mental Health (respondents) for inadequate psychiatric treatment for inmates with psychiatric disorders).

minimally adequate mental health care is not being provided." (May this Honorable Court be reminded that petitioner went on strike in 1991 and three years later there is still no adequate mental health care!)

Page 84: "...the Exp. T. is unanimously of the view that the Ohio prison system does not meet minimally adequate staffing levels in any personnel category. This deficiency in staffing leads us to conclude that Ohio does not meet its minimal obligations to identify the mentally ill; to adequately engage in regular treatment activities designed to ameliorate suffering or obtain care..." "The Ohio prison system, and its service provider—the Department of Mental Health—are so seriously understaffed in every category of mental health staffing that it is not possible to comply with even minimal, (constitutional obligations) as we understand them." (This statement is the foundation stone for petitioner's Writ of Certiorari! These facts do show that petitioner was unable to give mandated minimal constitutional care. Here respondent's expert team has completely supported petitioner's stand).

On pages 104 and 105 of the report the recommendation for Cluster 5—Dayton, Lebanon, and Warren (Correctional institutions) is 3 full-time psychiatrists. This shows beyond all doubt that it was totally impossible for petitioner to be the only psychiatrist at Lebanon and Warren (Correctional Institutions) and give adequate care. May the court also be reminded that there was a Residential Treatment Unit at Lebanon in 1991 when petitioner was there which also shows an even greater need for psychiatrists and how impossible his task was.

page 146: "There is no initial evaluation or screening for this group and no therapeutic programming." "It would seem that this group of inmates and the use of control has replaced the RTU (Residential Treatment Unit) which closed in July of 1992 and until then was viewed as a valuable resource for the men-

tally ill" (petitioner had helped make the RTU into a "model program" but respondents, ODMH, destroyed it by causing petitioner's constructive discharge).

Volume II:

page 37: "...inadequate staffing levels in Psychological Services (DRC) and Psychiatry (DMH) ensure an inability for even mandated service requirements to be met." (This raises a substantial Constitutional question especially in regards to 8th and 14th Amendment Rights of inmates).

On 9-14-94 petitioner received from the State of Ohio Department of Rehabilitation and Correction a 48-page: Final Report and Recommendations of the Governor's Select Committee on Corrections dated January 1994. Page 22 gives full support regarding petitioner's stand about inadequate staffing (Ohio Supreme Court Appendix 5):

page 22: "We cannot overemphasize the need for adequate staffing levels and high quality personnel...currently, staffing is inadequate..."

On 9-15-94 State Senator Betty Montgomery's (new 1995 Ohio Attorney General) office mailed to petitioner a 31-page document: An interim report from the Correctional Institution Inspection Committee. This sheds light on staffing problems along with other concerns. Page 8 is Ohio Supreme Court Appendix 6):

page 8: "Compared to other state prison systems of comparable size Ohio prison staffing has consistently ranked dangerously low."

As these documents have shown, respondents expectations regarding petitioner's psychiatric caseload is totally unreasonable, and the wrongful conduct of the respondent which forced petitioner into an untenable position leads to an unquestionable Constructive-Discharge of petitioner, which hopefully this Honorable Court will act on.

According to Sanabria v. Village of Monticello 424 F. Supp. 402 (1976):

> p. 407: "The deprivation of medical care to a prisoner has been considered both a denial of due process as guaranteed by the fourteenth amendment...and a violation of the eighth amendment right to be free from cruel and unusual punishment, Estelle v. Gamble, -US-, 97 S Ct. 285, 50, L. Ed. 2d 251 (1976)...
>
> Treatment of the mental disorders of mentally disturbed inmates is a "serious medical need". Wellman v. Faulker, 715 F. 2d 269 (1983).

Adequate staff is necessary for care. Mentally ill persons suffering an acute condition and are violent or dangerous require intensive care and treatment. Rone v. Fireman, 473 F. Supp. 92, 102 (1979).

Inadequate mental health staffing leads to inmate suffering, self-mutilation, and suicide according to Ramos v. Lamm 639 F. 2d 559 (1980).

According to: Monmouth County Correctional Institution Inmates v. Lanzaro 834 F. 2d 326 (3rd Cir. 1987) Prison officials "bear the burden of demonstrating the adequacy of the means they choose" regarding accommodation of constitutional rights of inmates.

Davis v. Watkins 384 F. Supp. 915, 917 (1980) is a Right to Treatment Case in Ohio. Psychiatrist Paul Watkins was sued as an individual and in his official capacity. (Petitioner was under the same liability.)

Howell v. Evans, 922 F. 2d 712 (11th Cir. 1991) stated a doctor could be held liable for "deliberate indifference" despite defense of qualified immunity. (If petitioner had not gone on strike and let his patients go without care he would have been liable for "deliberate indifference").

In Perry v. Sindermann, 408 U.S. 593, 597 (1972), the Court announced that "even though a person has no 'right' to a valuable government benefit and even though the govern-

ment may deny him the benefit for any number of reasons, (it may not do so) on a basis that infringes his constitutionally protected interests...(for petitioner, this is his job, benefits, and medical license, and freedom from violation of ethical codes, and laws). "...Cause of action in damages...(are) available to an individual who has suffered a constitutional deprivation..." Sanabria v. Village of Monticello 424 F. Supp. 402 (1976).

As per Riss & Co. v. Association of Am. Railroads, D.C. D.C., 190 F. Supp. 10, 17 substantial evidence, such as provided by petitioner, precludes Summary Judgment for the respondent.

Summary Judgment "must only be used with extreme caution for it operates to deny a litigant his day in court", Smith v. Hudson, 600 F. 2d at 63.

Independently unconstitutional conditions - those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right - are invalid; whether a condition is unconstitutional depends on whether government may properly demand sacrifice of the alleged right in the particular context. That was the holding of FCC v. League of Women Voters (468 U.S. 364 (1984) and of Babbitt v. Planned Parenthood Federation (107 S. Ct. 391 (1986). Cite by: Tribe, Lawrence H., American Constitutional Law, 2nd Ed., New York: The Foundation Press, Inc., 1988, p. 781.

> The resolution of statutory or constitutional issues is a primary responsibility of courts. Alexander v. Gardner-Denver Company, 415 U.S. 36, 39L Ed 2d 147, 163 94 S. Ct. 1011 (1974).

(d) Error In The Courts Below

The merits of the petitioner's case were never discussed in the trial court.

In petitioner's Complaint to the trial court he mentioned that his constitutional rights were violated and that he was placed in wrongful conditions (unconstitutional conditions),

by respondent expecting petitioner to violate the constitutional rights of inmates, by not administering constitutionally mandated care. These issues were presented extensively in petitioner's Motion for Summary Judgment along with extensive federal cases supporting petitioner's stand. The trial court never addressed these constitutional issues lending great error in it's Judgment.

The above constitutional issues were also addressed by petitioner in his appeal brief to the Court of Appeals. Although the Court of Appeals Opinion did recognize (page 5) that petitioner's grievance addressed the fact that petitioner had alleged that prisoners were denied their constitutional right to treatment because his caseload was too heavy for him to provide adequate care, they never addressed this unconstitutional conditions issue. The court raised the issue on page 6 of "whether a 'genuine issue of material fact' exists to prevent granting defendant's Summary Judgment Motion. The new and recent documents that petitioner referred to in his Ohio Supreme Court Motion For Reconsideration give full support to his allegations of being unable to give constitutionally mandated treatment, and shows the great error of the Court of Appeal's statement that petitioner has not provided evidence that the employer's position is unreasonable.

The irony of the error of the Ohio Supreme Court's declining jurisdiction to hear petitioner's case, and dismissing the appeal as not involving any substantial constitutional question, lies in the fact that respondents in their opposition, rightly acknowledged that petitioner had raised a constitutional issue, also previously briefed: alleged indifference to inmate medical care even though respondents did not acknowledge its significance. A physician may lose his license for such.

The Ohio Supreme Court was in error for not addressing these "unconstitutional conditions", and prays this Court will address such issues.

III. The Question Presented Is Important

When the public have need of medical care, they expect that physicians will respond in an ethical, empathic man-

ner, and will do them no harm. Would it not then be a violation of public policy for the government to expect the opposite? Did not this government along with other world governments react in absolute horror, when Nazi doctors, responded "Not guilty" at Nuremberg, because they were 'just' following government dictates. The position the state placed petitioner in is no different.

Without adequate treatment inmates with psychiatric disorders do decompensate. Life for them becomes unbearable, feeling depressed, hopeless, being psychically tortured by 'voices', they are prone to harm themselves, and worse, commit suicide.

Petitioner refused to violate his medical ethics, and the constitutional rights of his patients. The Expert Team commissioned by the state (respondents) found that inmates were not receiving constitutionally minimal mandated care. Can this Honorable Court ignore this? Petitioner thinks not, and prays that this Honorable Court will see to it that the state (respondents) do uphold the Constitution.

As everyone is aware the prisons are growing by leaps and bounds. Adequate medical care is needed. Physicians are fearful of working in prisons because of governmental interference with medical practice; and inmate suits. Since the federal courts have established law regarding adequate medical care, e.g., Estelle v. Gamble, 429 U.S. 97 (1976), it would stand to reason, that this Court would enforce such law by upholding petitioner's ethical stand, refusing the dictates of the state to show "deliberate indifference" to inmates psychiatric disorders, thereby causing cruel and unusual punishment violating their Eighth Amendment rights, therefore, this court's guidelines through legal precedent, are greatly needed for the states regarding physician's right to follow ethical guidelines in administering constitutionally mandated care.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue the review the Judgment and Opinion of the Court

of Appeals, Tenth Appellate District, Franklin County, Ohio in this matter.

Respectfully submitted,

Dated: March 16, 1995

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Dr. Richard A. Scarnati,	:	
Plaintiff-Appellant,	:	
v.	:	No. 94API01-102
Ohio Department of Mental Health,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

OPINION

Rendered on August 11, 1994

Richard A. Scarnati, pro se.

Lee Fisher, Attorney General, and *Susan C. Walker,* for appellee.

APPEAL from the Ohio Court of Claims.

WHITESIDE, P.J.

Plaintiff-appellant, Richard A.

Scarnati, appeals from a judgment of the Ohio Court of Claims which granted defendant's summary judgment motion and raises the following eighteen assignments of error:

"1. The issues in appellant's complaint have not been litigated before as claimed by the Court of Claims, however, Appellant did set a 'just cause' precedent for his resignation in the Court of Appeals against the Unemployment Compensation Board.

"2. The Mitchell v. Medical College of Ohio, September 3, 1992, No. 92 AP-247, In the Court of Appeals of Ohio, Tenth Appellate District, unreported, (attached hereto as Exhibit 53) case that the Court of Claims used

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in making its decision has absolutely no relevance in appellant's case. The Mitchell suit was an alleged 'breach of a collective bargaining agreement' action; appellant's suit is not an alleged 'breach of a collective bargaining agreement' type of suit. Appellant is not arguing a 'breach of contract' case.

"3. Moore v. Youngstown State University (1989), 63 Ohio App.3d 238 (attached hereto as Exhibit 54) was another case that the Court of Claims used in making its decision. This case also has absolutely no relevance in appellant's case. Again that was an alleged breach of collective bargaining agreement type case. Appellant's case is not a breach of collective bargaining agreement type suit. Note that the Moore case as noted on page 240 concerned solely a subject matter jurisdiction of the claims court over such suits, and did not present any issue as to the merits of appellant's complaint. That court did rightly find that Moore needed to be in Common Pleas Court for a violations of a collective bargaining agreement. Appellant does not have such suit and is appropriately in the Court of Claims for his complaints.

"4. Rule 56(c) of the Civil Rules of Civil Procedure permits Summary Judgment only if there is no genuine issue as to any material fact. Appellant has many such issues and he already has proved 'just cause' in the Court of Appeals.

"5. A Summary Judgment shall not be rendered unless it appears from the evidence, and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for Summary Judgment is made. There is absolutely no way that 'reasonable minds' looking at the evidence that appellant presented could have come to the decision that the Court of Claims made.

"6. This is not an action that was grievable under a Collective Bargaining Agreement. A grievance as used in the agreement referred to an alleged violation, misinterpretation, or misapplication of specific articles or sections of the agreement, therefore, the union contract was very limited in types of issues grievable. If a problem such as a potential violation of a medical code of ethics (public policy) was not included, then such subject matter, as is the case, was not grievable and

therefore not 'litigated' as claimed by the Court of Claims.

"7. ORC Section 4117.08 lists subjects appropriate for collective bargaining and with such heading we already note that some subjects will not be included, specifically, ORC, Section 4117.08(C)(1)-(9) states in essence that the employer is not required to bargain on subjects reserved to 'management.'

"8. Borg-Warner, 356 U.S. at 349 held that a party may not insist on bargaining to impasse over a non-mandatory subject of bargaining and appellant did not attempt to do that.

"9. Reeves v. Union Township Board of Trustees et al, 563 N.E. 2d 370 (Ohio App. 1989) p370 found that where a collective bargaining agreement for public employees does not speak on a matter, the parties are subject to all state laws, ORC, Section 4117.10(A) states statutory law may supplement collective bargaining agreement between public employer and its employees any time agreement's terms do not address a mat

ter, for example, under OAC, Chapter 5122-14-01(C)(32) appellant has a professional duty to patients and union contracts cannot override such duties. Appellant under ORC, Section 2743.14 would not have been legally represented in a suit if he would have acted recklessly by not treating patients adequately. Under Wren v. Ohio Department of Mental Health, 16 0 App. 3d 160 appellant would not have been represented by the Attorney General. A union contract does not address all these issues.

"10. Appellee has attempted to unmeritoriously reduce appellant's entire case to a 'violation of the Collective Bargaining Agreement'. The evidence clearly shows this is not the case. Appellant does have rights that exist independently of the Collective Bargaining Agreement. A Union Agreement cannot supplant appellant's constitutional, statutory, common law, ethical, moral and professional rights.

"11. Legal precedents for 'just cause' for appellant's resignation were set in Scarnati v. State of Ohio Unemployment Compensation Board of Review et al. No. 92AP-1631, in the Court of Appeals of Ohio, Tenth Appellate District, March 2, 1993, Unreported, (attached hereto as Exhibit 45) and Scarnati v. State of Ohio Unemployment Compensation Board of Review et al. Case

No. 92CVF-04-3176, Court of Common Pleas of Franklin County, Ohio, April 20, 1993, unreported, (attached hereto as Exhibit 47) and the 'cast-in-stone (appellee did not appeal) facts that were established in those two courts totally preclude an award of Summary Judgment for the Appellee!

"12. In In Re Burton, 11 Ohio St. 3d 147, (11 OBR 465, 471) the court emphasized; the testimony of the treating physician or psychiatrist is to be given considerable weight by the trial court, and as we have seen it was not.

"13. As per Riss & Co. v. Association of Am. Railroads, D.C. D.C., 190 F. Supp 10, 17 substantial evidence, such as provided by appellant, precludes Summary Judgment for the appellee.

"14. The basis of this action, in essence, are Constructive Discharge and Public Policy torts not a breach of a Collective Bargaining Agreement as appellee alleges!

"15. Appellee has not met its burden of showing that there are no genuine issues as to material facts, particularly when the evidence is viewed in a light most favorable to appellant. Appellant is entitled to his day in court, and, therefore, Summary Judgment is improper as a matter of law for appellee.

"16. The Court of Claims never addressed the merits of appellant's case.

"17. As a physician, appellant is bound by Codes of Medical Ethics which cannot be supplanted by a 'Union Contract'. The Court of Claims did not address this vital issue.

"18. As a licensed physician in the State of Ohio, appellant is bound by the statutes of the Ohio State Medical Board and this statute cannot be supplanted by a 'Union Contract'. The Court of Claims did not address this vital issue."

Plaintiff was employed by the State of Ohio, Department of Mental Health ("ODMH"), as a psychiatrist providing services to prison inmates. On May 29, 1991, plaintiff filed a grievance pursuant to the contract between the

state and the Ohio Health Care Employees Union ("Union") of which he was a member. The grievance pertained to the lack of psychiatrists employed to provide adequate care and that his caseload was too heavy for him to provide adequate care to his patients

(alleging that prisoners were denied their constitutional right to treatment). The grievance was denied through four grievance steps and withdrawn by the Union in November 1991. On June 7, 1991, plaintiff filed a second grievance concerning the fact that his vacation request was denied since he was needed due to the low number of staff members. This grievance was also denied through four grievance steps and submitted by the Union to arbitration but was withdrawn by the Union in October 1991. Plaintiff resigned his position in July 1991 citing as reasons that the expectations of his position conflicted with the ethical considerations of his profession by "forcing" him to "hurt his patients" by not providing "adequate care." (See letter of resignation, July 2, 1991, p. 2.)

Plaintiff filed a complaint in the Court of Claims alleging the tort of "abusive, wrongful, constructive discharge." Although he did resign his position, he argues that the working conditions forced him to resign. He sought reinstatement, grade and pay advancements, an opportunity to be considered for top-level positions which had become vacant in his absence or may have been filled, back pay, restitution of vacation, sick leave and personal leave, two months of "needed vacation," payment of back retirement funds, additional educational leave, safe office environment with air conditioning, adequate office supplies, suitable parking place, total relocation expenses, and compensatory and

actual damages.[1] The trial court granted defendant's motion for summary judgment finding that plaintiff's complaint was not properly before the trial court because "plaintiff is attempting to relitigate issues that have already been determined pur

[1]Plaintiff is in the incorrect forum for reinstatement and such related relief since the Court of Claims cannot provide such relief. Therefore, the only issue here before the Court of Claims was his claim for damages.

suant to the grievance procedure in his collective bargaining agreement." (Entry, Jan. 3, 1994.) Plaintiff is appealing that judgment.

Although not clearly stated as such, in essence, plaintiff's assignments of error raise the single issue of whether the trial court erred in granting defendant's summary judgment motion. The standard for granting a summary judgment motion is provided in Civ.R. 56, and the initial pertinent question is whether a "genuine issue of material fact" appears from the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence and written stipulations of fact." A genuine issue of material fact exists unless it is clear from the evidence or stipulation "that reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor." Civ.R. 56(C); *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 151. Only under such circumstances is the "moving party entitled to judgment as a matter of law." *Harless v. Williss Day Warehousing Co.* (1978), 54 Ohio St.2d 64. The moving party must demonstrate that no genuine issue of material fact exists and the burden is on the nonmoving party to affirmatively demonstrate that a genuine issue of material fact does exist in

order to prevent the granting of a motion for summary judgment. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112. Such a motion if properly supported forces the nonmoving party to produce evidence on any issue for which the party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the syllabus (*Celotex v. Catrett* [1986], 477 U.S. 317, approved and followed).

In this case, the trial court did not err in granting defendant's motion for summary judgment. Plaintiff has not presented a claim for relief for constructive discharge. In order to constitute a constructive discharge, the working conditions must be such that a reasonable person would feel compelled to resign. *Henry v. Lennox Indus., Inc.* (C.A.6, 1985) 768 F.2d 746, 752, citing *Held v. Gulf Oil Co.* (C.A.6, 1982), 684 F.2d 427, 432; *Easter v. Jeep Corp.* (C.A.6, 1984), 750 F.2d 520, 522-523. See, also, *Bellian v. Bicron Corp.* (1994), 69 Ohio St.3d 517, 520; *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm.* (1990), 64 Ohio App.3d 480, 487. Making such a determination "*** depends on the facts of each case and 'requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct on the employee.'" *Henry, supra,* quoting *Held, supra.*

In this case, plaintiff was dissatisfied with the number of patients he was responsible for treating. He filed a grievance under his collective bargaining agreement and conducted a three-day "strike *** [with the] hopes to raise public awareness for the plight of his patients." (Plaintiff's brief, p. 24.) Plaintiff then resigned his position. However, his grievance was denied through four grievance stages because management believed that plaintiff's "perception that management *** is or about to commence an administrative

procedure which will severely impact the care and well being of his patients at this time is unfounded." Additionally, management was "*** of the perception that forty hours of on-site psychiatric coverage is within acceptable limits to meet the needs of patients at the LeCi and WCI program." (Grievance denial stage one.) Plaintiff's and management's perceptions of the necessary psychiatric coverage clearly differed.

Plaintiff argues that this court's decision, *Scarnati v. State of Ohio Unemployment Compensation Board of Review*

(Mar. 2, 1993), Franklin App. No. 92AP-1631, unreported (1993 Opinions 606), controls this situation. That case involved unemployment benefits which were denied to the plaintiff after he had terminated his employment. This court found that the plaintiff had "just cause" to discontinue his employment and reversed the judgment of the common pleas court which had affirmed the denial of benefits. However, the test of "just cause" for unemployment compensation purposes is different from that required for constructive discharge. "Just cause" has been described by the Supreme Court of Ohio in *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 17:

> "*** '[t]here is, of course, not a slide-rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.'" *Irvine* quoting *Peyton v. Sun T.V.* (1975), 44 Ohio App.2d 10, 12.

"Just cause" as used in R.C. 4141.29, refers to a justifiable reason for terminating an employee as viewed from the employee's perspective and is predicated upon conduct of the employee. See *Morris v. Ohio Bur. of Emp. Serv.* (1993), 90 Ohio App. 3d 295, 299. It requires some degree of "fault" on the part

of the employee even though the fault does not necessarily need to be wrongful conduct. See *Sellers v. Unemployment Comp. Bd. of Review* (1981), 1 Ohio App.3d 161. The same is true in the unemployment context in that an employee may have "just cause" in discontinuing employment where there is conduct on the part of the employer which justifies the employee's actions, but that employer conduct does not neces

sarily need to be wrongful. However, the constructive-discharge context necessarily involves wrongful conduct on the part of the employer which forces the employee into an untenable position.

In this case, plaintiff's belief that the employer's conduct is wrongful is not determinative. Neither the employee nor the employer commits wrongful conduct by acting in accordance with personal opinion as to what is right unless such opinion is unreasonable and without foundation. Plaintiff has not provided evidence that the employer's position is unreasonable, merely that plaintiff finds it so. Construing the evidence most strongly in plaintiff's favor, it appears to be reasonably debatable as to whether plaintiff's assigned workload was appropriate. There is no evidence of specific, objective and recognized ethical standards that the employer's position violates. Plaintiff merely presents his conclusion that the employer's position conflicted with the ethical considerations of his profession by "forcing" him to "hurt his patients" by not providing "adequate care." (See letter of resignation, July 2, 1991, p. 2.) Plaintiff has merely demonstrated a difference of opinion as to what constitutes appropriate psychiatrist-patient ratio to provide "appropriate care." The case involves a valid disagreement over appropriate conduct, but such disagreement does not render either position "wrongful." Even though for unemployment purposes plaintiff may have had "just cause" to discontinue his

employment, it does not necessarily follow that his resignation constitutes a constructive discharge since there is no evidence of wrongful conduct by the employer. "Just cause" in the unemployment context is more of a subjective test from the employee's viewpoint. In the constructive-discharge context, an objective test must be used with respect to the employer's conduct alleged to have included the resignation. The facts of this case do not rise to the level where reasonable

minds could find constructive discharge upon the evidence construed in plaintiff's favor. Consequently, plaintiff's assignments of error are not well-taken.

For the foregoing reason, all of plaintiff's assignments of error are overruled, and the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

BOWMAN & CLOSE, JJ., concur.

-3613-

Filed
Aug. 11, 94

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Dr. Richard A. Scarnati,	:	
Plaintiff-Appellant,	:	
v.	:	No. 94API01-102
Ohio Department of Mental Health,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on August 11, 1994, all of plaintiff's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is affirmed.

WHITESIDE, P.J., BOWMAN & CLOSE, JJ.

By _____
Judge Alba L. Whiteside, P.J.

cc: Richard A. Scarnati, *pro se.*
Susan C. Walker, AAG

THE SUPREME COURT OF OHIO

1994 TERM

To wit:
December 7, 1994

Dr. Richard A. Scarnati, Appellant,	:	Case No. 94-1870
v.	:	
Ohio Department of Mental Health, Appellee.	:	ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Dr. Rick Scarnati.

(Franklin County Court of Appeals; No. 94AP101102)

THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1994 TERM

To wit:
December 29, 1994

Dr. Richard A. Scarnati, Appellant,	:	Case No. 94-1870
v.	:	RECONSIDERATION ENTRY
Ohio Department of Mental Health, Appellee.	:	(Franklin County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and the same is hereby, denied.

(Court of Appeals No. 94API01102)

THOMAS J. MOYER
Chief Justice

C-1

IN THE COURT OF CLAIMS OF OHIO

Filed
Jan. 3, 94

RICHARD A. SCARNATI Plaintiff	:	Case No. 93-06781
v.	:	ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
OHIO DEPARTMENT OF MENTAL HEALTH Defendant	:	Judge Russell Leach

: : : : : : : : : : :

On October 22, 1993, defendant filed a motion for summary judgment. On November 15, 1993, plaintiff filed a response and a cross-motion for summary judgment. On December 7, 1993, defendant filed a motion for leave to file an additional reply. Defendant's motion for leave is GRANTED. A non-oral hearing was held on December 10, 1993.

Upon review, the court finds that plaintiff's complaint is not properly before it because plaintiff is attempting to relitigate issues that have already been determined pursuant to the grievance procedure in his collective bargaining agreement. ***Mitchell v. Medical College of Ohio*** (September 13, 1992), Franklin App. No. 92AP-247, unreported; ***Moore v. Youngstown State University*** (1989), 63 Ohio App. 3d 238. Therefore, defendant's motion for summary judgment is GRANTED. Plaintiff's motion for summary judgment is OVERRULED. Court costs are assessed against plaintiff. The

clerk shall serve upon all parties notice of this

judgment and its date of entry upon the journal.

RUSSELL LEACH
Judge

Entry cc:

Dr. Richard A. Scarnati
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Pro se

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0016A/36-37/FDG